stated that this "surrogate could be used to calculate the approximate amount of originating traffic using the [resellers'] services that each defendant handled, thus allowing a reasonable measure of the damages for which each [LEC] is responsible." 1995 FCC Order, ¶ 25.

10. Next, SBC and certain other defendants sought review before the United States Court of Appeals for the District of Columbia Circuit. Before the District of Columbia Circuit, they acknowledged the Commission found that they "are liable to the resellers for damages for violating the Communications Act." Joint Reply Brief of Local Exchange Carrier Petitioners and Intervenors, at 18-19, attached to the Petition to Deny as Exhibit 2. The LECs also "effectively conceded that they were not entitled to charge the two higher CCL charges they ha[d] assessed with respect to calls made through [resellers'] services." Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593, 597 (D.C. Cir. 1997).

11. The District of Columbia Circuit upheld the Commission's ruling in all respects. See Southwestern Bell Tel., 116 F.3d 593. Among other things, the court ruled that the Commission was entirely correct to require SBC and the other LECs to comply with its requirement of working out a means of refunding these overcharges and that it "border[ed] on the frivolous" for SBC to expect the Commission to assume that AT&T did not pass through these overcharges at the resellers' cost. Id. at 597-98

12. Not even the District of Columbia Circuit's directive, however, has led SBC to comply with the requirements of the 1987 Readyline Order that it design a formula that ensures a rebate of the CCL overcharges. In spite of the clear rulings by the Common Carrier Bureau, the full Commission, and the District of Columbia Circuit, when we returned to the District Court seeking an order requiring the LECs to disgorge the CCL overcharges, SBC and the other LECs actually denied that they "have done anything unlawful." See for example, Answer of

Defendants Southwestern Bell Telephone Co., Nevada Bell and Pacific Bell, at ¶¶ 37-38, attached hereto as Exhibit A.

13. The position of SBC and the other LECs is essentially that, even though (a) the 800 Readyline Clarification Order required the LECs to create a mechanism for refunding CCL overcharges; (b) the Common Carrier Bureau and the full Commission both held the LECs' were required to follow the Readyline Order; and (c) the District of Columbia Circuit upheld the Commission in every respect, this decade of proceedings has left them free to retain the overcharges. Indeed, they have even asserted that the court, at this stage of the proceedings, should forget entirely that SBC was ordered to work out a method to rebate these overcharges, or that it was required to disgorge the overcharges. Instead, they essentially maintain that they are perfectly free to retain the hundreds of millions of dollars of unlawful overcharges, forever, until and unless the victims of these overcharges can reconstruct every call made during the 6-1/2 year period during which SBC exacted the overcharges.

14. I have read the Petition to Deny, to which this affidavit is Exhibit 1, and assert that it is true and correct to the best of my information and belief.

Victor J. Toth

Sworn before me this 14th day of September, 1998.

Notary Public

My Commission expires:
April 14, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LONG DISTANCE/USA, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Civil No. 88-1477 (JGP)
	)	
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al.,	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANTS SOUTHWESTERN BELL TELEPHONE CO., NEVADA BELL AND PACIFIC BELL

Defendants Southwestern Bell Telephone Co., Nevada Bell and Pacific Bell, by their attorneys, answer the amended complaint in this action as follows:

1. Deny the allegations of paragraph 1 of the amended complaint, except admit that plaintiffs purport to bring the action as described.

2. Admit the allegations of paragraph 2 of the amended complaint that the Court has subject matter jurisdiction.

3. Deny the allegations of paragraph 3 of the amended complaint, except deny information or knowledge sufficient to form a belief regarding the allegations concerning other defendants.

4. Deny the allegations of paragraph 4 of the amended complaint.

5. Deny the allegations of paragraph 5 of the amended complaint, except admit that plaintiffs purport to bring the action as described and that some 800 services made use of LEC facilities to complete customer calls.

6. Deny the allegations of paragraph 6 of the amended complaint, except deny knowledge or information sufficient to form a belief as to the truth of the averment regarding the estimated class size.

7. Deny the allegations of paragraph 7 of the amended complaint, except deny knowledge or information sufficient to form a belief as to the experience of plaintiffs' counsel.

8. Deny the allegations of paragraph 8 of the amended complaint.

9. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 of the amended complaint.

10. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 of the amended complaint.

11. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 11 of the amended complaint.

12. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 12 of the amended complaint.

13. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 13 of the amended complaint.

14. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 14 of the amended complaint.

15. Admit the allegations of paragraph 15 of the amended complaint, except deny that they (or other BOCs) provide a monopoly service.

16. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 16 of the amended complaint relating to other companies and deny the remainder of the paragraph.

17. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 17 of the amended complaint.

18. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 18 of the amended complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 19 of the amended complaint.

20. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 20 of the amended complaint.

21. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 21 of the amended complaint.

22. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 22 of the amended complaint.

23. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 23 of the amended complaint.

24. Admit the allegations of paragraph 24 of the amended complaint.

25. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 25 of the amended complaint regarding other companies, except admit that Nevada Bell has its principal office at 645 East Plumb Lane, Reno, Nevada 89502 and is incorporated under the laws of the State of Nevada, Southwestern Bell Telephone Co. has its principal office in St. Louis, Missouri and is incorporated

under the laws of the State of Missouri, Pacific Bell has its principal office in San Francisco, California and is incorporated under the laws of the State of California, and deny the remainder of the paragraph.

26. Deny the allegations of paragraph 26 of the amended complaint, except admit that the amended complaint defines the terms as indicated.

27. Deny the allegations of paragraph 27 of the amended complaint.

28. Deny the allegations of paragraph 28 of the amended complaint, except admit that most local and long distance calls are or were completed as described and deny knowledge or information sufficient to form a belief as to the truth of the averment regarding the portion of lines served by the defendant BOCs.

29. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 29 of the amended complaint.

30. Deny knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 30 of the amended complaint.

31. Admit the allegations of paragraph 31 of the amended complaint.

32. Admit the allegations of paragraph 32 of the amended complaint.

33. Admit the allegations of paragraph 33 of the amended complaint.

34. Admit the allegations of paragraph 34 of the amended complaint, except deny that section 69.207 provides that only one NTS charge may be applied to 800 ReadyLine-type calls.

35. Deny knowledge or information sufficient to form a belief as to the truth of the averment regarding defendant NECA of paragraph 35 of the amended complaint, and deny the remainder of the paragraph.

36. Deny the allegations of paragraph 36 of the amended complaint, except deny knowledge or information sufficient to form a belief as to the truth of the averments regarding other companies.

37. Deny knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 37 of the amended complaint, except deny that defendants have done anything unlawful.

38. Deny knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 38 of the amended complaint, except deny that defendants have done anything unlawful.

39. Deny the allegations of paragraph 39 of the amended complaint.

40. Deny the allegations of paragraph 40 of the amended complaint.

41. Admit that paragraph 41 of the amended complaint incorporates the indicated paragraphs by reference, and incorporate by reference their answers to such paragraphs.

42. Deny the allegations of paragraph 42 of the amended complaint.

43. Deny the allegations of paragraph 43 of the amended complaint.

44. Deny the allegations of paragraph 44 of the amended complaint.

45. Admit that paragraph 45 of the amended complaint incorporates the indicated paragraphs by reference, and incorporate by reference their answers to such paragraphs.

46. Deny the allegations of paragraph 46 of the amended complaint.

47. Deny the allegations of paragraph 47 of the amended complaint.

48. Deny the allegations of paragraph 48 of the amended complaint.

49. Admit that paragraph 49 of the amended complaint incorporates the indicated paragraphs by reference, and incorporate by reference their answers to such paragraphs.

50. Deny the allegations of paragraph 50 of the amended complaint.

51. Deny the allegations of paragraph 51 of the amended complaint.

52. Deny the allegations of paragraph 52 of the amended complaint.

53. Deny the allegations of paragraph 53 of the amended complaint.

54. Admit that paragraph 54 of the amended complaint incorporates the indicated paragraphs by reference, and incorporate by reference their answers to such paragraphs.

55. Deny the allegations of paragraph 55 of the amended complaint.

56. Deny the allegations of paragraph 56 of the amended complaint.

57. Deny the allegations of paragraph 57 of the amended complaint.

58. Deny the allegations of paragraph 58 of the amended complaint.

59. Admit that paragraph 59 of the amended complaint incorporates the indicated paragraphs by reference, and incorporate by reference their answers to such paragraphs.

60. Deny the allegations of paragraph 60 of the amended complaint.

61. Deny the allegations of paragraph 61 of the amended complaint.

62. Deny the allegations of paragraph 62 of the amended complaint.

63. Deny the allegations of paragraph 63 of the amended complaint.

64. Deny the allegations of paragraph 64 of the amended complaint.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The court lacks personal jurisdiction over the answering defendants.

THIRD AFFIRMATIVE DEFENSE

Venue is improper in this district.

FOURTH AFFIRMATIVE DEFENSE

The claims are barred in whole or in part by the statute of limitations.

FIFTH AFFIRMATIVE DEFENSE

The claims are barred to the extent that plaintiffs (or members of the putative class) or interexchange carriers received refunds or credits from the answering defendants with respect to the calls at issue.

SIXTH AFFIRMATIVE DEFENSE

The claims are barred in whole or in part by waiver or estoppel.

SEVENTH AFFIRMATIVE DEFENSE

The claims are barred in whole or in part by release and discharge, or by accord and satisfaction.

Dated: New York, New York
January 23, 1998

Respectfully submitted,

DEWEY BALLANTINE LLP

By: _____

Joseph Angland
D.C. Bar No. 416227
1301 Avenue of the Americas
New York, New York 10019
(212) 259-8000

Attorneys for Defendants Southwestern Bell Telephone Co., Nevada Bell and Pacific Bell

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 1998, I served a true and correct copy of the Answer of Defendants Southwestern Bell Telephone Co., Nevada Bell and Pacific Bell by first class Untied States mail, postage prepaid, upon the following:

Victor J. Toth, Esq.
2719 Soapstone Drive
Reston, Virginia 20191

John Haven Chapman, Esq.
Tenzer Greenblatt, L.L.P.
405 Lexington Avenue
New York, New York 10174

Dated: New York, New York
January 23, 1998

Carol A. Polizzi

ORAL ARGUMENT SCHEDULED FOR MAY 14, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1193
(and consolidated cases)

SOUTHWESTERN BELL TELEPHONE COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

JOINT REPLY BRIEF OF LOCAL EXCHANGE CARRIER PETITIONERS AND INTERVENORS

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Telephone Company

[Names of Additional Counsel Appear on Signature Page]

March 26, 1997 [Re-filed April 16, 1997]

credit (reduced originating carrier common line rates) themselves on their own account from petitioners and reflect this credit in the amount charged to the resellers.

The FCC's reason why this Court should countenance its relieving the resellers of their burden of proving key elements of their complaints is dramatic: "The Commission has had decades of experience regulating AT&T."[26] This Court has had decades of experience reviewing decisions of the FCC, but petitioners are not aware of any decision by this Court substituting this Court's experience for actual review of an FCC decision on the record. We submit that this concession by the FCC places this case precisely within the general prohibition that the FCC may not substitute speculation and assumption for factual findings based on a record.[27]

IV. THE FCC'S DECISION THAT PETITIONERS VIOLATED THE COMMUNICATIONS ACT IS NOT ENTITLED TO DEFERENCE

In our opening brief, petitioners noted that the Supreme Court had ruled in Northern Pipeline that a legislative or political body could not usurp the constitutionally assigned judicial function without running afoul of Article III of the

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Petitioners stated that they had no way of determining whether AT&T included CCL costs in its rates or how AT&T passed them on to resellers if it did so at all.

[26] FCC Brief at 20.

[27] See National Gypsum Co. v. U.S. Environmental Protection Agency, 968 F.2d 40, 43-44 (D.C. Cir. 1992).

Constitution.[28] At the very least, we submitted, this decision meant that the FCC could not adjudicate damages claims based on political considerations.

The FCC's response is instructive. While it never mentions the Northern Pipeline decision, the FCC launches into what is essentially a political defense of its decision, "[t]his controversy involves the interpretation and application of a Commission rule that the Commission adopted for the purpose of furthering the goals of a statute that the Congress enacted to achieve some public policy purposes"[29] and insists that its "interpretation of the agency's own rule" is entitled to the customary judicial deference.[30] This is precisely our point. The FCC clearly had the authority on a proper record to direct petitioners, AT&T, MCI and the resellers, to negotiate to determine how to measure and calculate a credit mechanism which included resellers. The FCC did not do so in the decisions under review and has not done so since. Such action would have been an entirely proper example of the FCC's legislative authority. Instead, the FCC has found defendants liable for private damages in the decisions under review, and it has done so in a manner which violates the most rudimentary protections which petitioners would have had available in an Article III Court. At the very least (and this is all petitioners have asked for in this case), petitioners are entitled to an in-depth review of the FCC's decision that petitioners are liable to the resellers for damages

[28] Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50 (1982).

[29] FCC Brief at 17.

[30] Id. 17-18.

for violating the Communications Act. In the context of this case, this means that the FCC's decision is not entitled in a private complaint proceeding to the deference normally due an agency's administrative order. Of course, we likewise submit that the FCC's decision is so fundamentally arbitrary that it would not be entitled to deference in any event.[31]

V. BELLSOUTH AND SNET FILED TIMELY PETITIONS FOR REVIEW

In its final argument, which the United States declined to join, the FCC continues to claim that BellSouth Telecommunications, Inc. ("BellSouth") and Southern New England Telephone ("SNET") did not file timely petitions for review. The FCC's theory is that, as these two petitioners had filed defective (by the FCC's analysis) petitions for reconsideration of the FCC's orders, they are barred from appealing the original orders.[32] The FCC claims that these petitioners should have sought review of the Bureau's dismissal of their petitions for reconsideration before seeking appellate relief. Intervenors actually argue that BellSouth and SNET lost all possibility of judicial recourse when they sought reconsideration of the FCC's orders rather than immediately appealing them to this Court.[33]

Petitioners' essential argument remains intact -- the orders did not become

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[31] See, Alltel Corporation v. FCC, 838 F.2d 551, 562 (D.C. Cir. 1988), in which the FCC was found to have "done a remarkable job of rebutting the presumption of its own expertise."

[32] FCC Brief at 28-29.

[33] Intervenors Brief at 35-36.

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

No. 95-1193

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

Pages 1 to 27

Washington, D.C.
May 14, 1997

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWESTERN BELL TELEPHONE COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	No. 95-1193

Wednesday
May 14, 1997

The above-entitled matter came on for oral argument, pursuant to notice

BEFORE:

THE HONORABLE STEPHEN F. WILLIAMS, Circuit Judge

THE HONORABLE DOUGLAS H. GINSBURG, Circuit Judge

THE HONORABLE DAVID B. SENTELLE, Circuit Judge

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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C-O-N-T-E-N-T-S

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Case No. 95-1193

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Mr. McKenna for Petitioner, Mr. Block for Respondents, and Mr. Byrnes for Intervenor.

ORAL ARGUMENT OF ROBERT B. MCKENNA, ESQ.

ON BEHALF OF THE PETITIONER

Good morning Your Honors. My name is Robert McKenna, counsel for the Petitioners.

Petitioners in this case are local exchange carriers who have been found to have charged excessively high rates for exchange access to carriers such as AT&T and MCI, and to be liable for damages. Yet paradoxically AT&T and MCI are not parties to the complaint. The complaining parties purchase no services from Petitioners. In fact the rates at issue which the Petitioners charge to AT&T and MCI have been expressly found to be lawful in the very proceeding in which we are challenging.

What happened? The FCC's rules and these are some arcane rules -- and I was listening during

the previous argument when counsel was advised to try to not use acronyms which are not explained. The FCC's rules dealing with what is called exchange access, the services which local exchange carriers or LECs provide to interexchange carriers that provide that when a terminating access rate, the rate for picking up a call and delivering it to the end user is higher than the originating rate, which happens in certain configurations. It still happens occasionally today and is probably going to happen again in the new rules.

And you have a situation where there is the -- only an originating call, like 800 is the example used here. You call 800, there is no real termination. The higher terminating rate is charged to the carrier for originating access. That's the FCC's rule and it is picked up in the carriers of all the petitioners.

The FCC has also ruled that when an 800 call actually has two ends, two open ends, a service called ReadyLine in the case of AT&T, that 800 call pays, will either pay the real originating rate notwithstanding the fact that it looks like a one ended call to the local exchange carrier. The direction of the Commission --

THE COURT: I take it you don't question either the basic rule or the proposition that in this case the circumstances that the Commission found -- under the circumstances the rule's objective was being thwarted. Is that correct? In other words I didn't see in you brief a merits claim for being able to make the high charge on both ends. Is that right?

MR. MCKENNA: Well, Your Honor, in a way you are. Basically the position is that the really -- when there are two open ends, we have a mechanism in the tariff and that tariff provides for credits to be paid, or to be assessed. As you notice when you read the tariff, it really says that you count minutes differently and things like that. And the customer carrier, when there are two open ends, goes to one of the petitioners with the credit -- this happens routinely -- and that credit is reutilized in calculating the proper access charge.

THE COURT: You aren't saying the amount which is involved here is any different from the amount that would be paid pursuant to that crediting arrangement. Is that correct?

MR. MCKENNA: That's correct.

THE COURT: Okay.

MR. MCKENNA: I think that is correct. I